ANG SENG WAN

v.

SURUHANJAYA POLIS DI RAJA MALAYSIA & ANOR

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
MOHD SAARI YUSOFF JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: N-02-29-1997]
31 DECEMBER 2001

ADMINISTRATIVE LAW: *Public servants - Dismissal of police officer - Whether dismissal justified - Whether police officer's representations sufficiently exculpatory - Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980, O. 26(4)*

ADMINISTRATIVE LAW: *Rules of natural justice - Disciplinary proceedings - Oral hearing, whether should have been given - Whether right to be heard denied - Statement of witnesses not supplied - Procedural fairness - Whether rules of natural justice transgressed - Whether dismissal of police officer justified - Federal Constitution, art. 135(2)*

PUBLIC SERVANTS: *Dismissal - Dismissal of police officer - Disciplinary proceedings - Oral hearing, whether should have been given - Whether right to be heard denied - Statement of witnesses not supplied - Procedural fairness - Whether rules of natural justice transgressed - Whether police officer's representations sufficiently exculpatory - Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980, O. 26(4) - Federal Constitution, art. 135(2)*

The plaintiff, an Assistant Superintendent of Police, was dismissed from the force by the Suruhanjaya Polis Di Raja Malaysia ('the Commission') following a meeting convened to deliberate four charges of indiscipline against him. No committee of inquiry was set up and the plaintiff was also not supplied with the usual reports and statement of witnesses. Apart from stating that the plaintiff was to be dismissed from the force, the Commission did not, in its decision, make any finding of guilt in respect of the four charges against the plaintiff. Aggrieved, the plaintiff brought an action for a declaration that his dismissal was unlawful and unconstitutional and therefore void. The High Court dismissed the action and the plaintiff appealed. The issue before the Court of Appeal was whether the proceedings which resulted in the plaintiff's dismissal were in keeping with the rules of natural justice.

Held:
Per Mohd Saari Yusoff JCA

[1] The plaintiff's representations *via* his reply to the show-cause letter were sufficient to rebut the four charges and exculpate him within the terms of O. 26(4) of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980. (pp 497 g & 498 b)

[2] Given that there was no evidence to contradict the plaintiff's exculpatory statements, and that the usual reports and statement of witnesses were not supplied to the plaintiff, the Commission should have held an oral hearing or enquiry. The Commission's failure to hold an oral hearing had therefore, in the very circumstances of the case, deprived the plaintiff of a reasonable opportunity of being heard. Consequently, the disciplinary proceedings conducted by the Commission were inconsistent with the rules of natural justice as enshrined under art. 135(2) of the Federal Constitution. (pp 498 b-c, e-f, h & 499 a & g)

[Appeal allowed; order of dismissal set aside; plaintiff reinstated.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Plaintif, seorang Penolong Penguasa Polis, telah dipecat daripada pasukan polis oleh Suruhanjaya Polis Di Raja Malaysia ('Suruhanjaya tersebut") berikutan dengan satu mesyuarat yang telah dijalankan untuk mempertimbangkan empat pertuduhan ketiadaan tatatertib terhadap beliau. Tiada jawatankuasa siasatan ditubuhkan dan plaintif juga tidak diberi laporan-laporan yang biasa dan kenyataan saksi-saksi. Selain daripada menyatakan bahawa plaintif haruslah dipecat daripada pasukan polis tersebut, Suruhanjaya tersebut tidak, dalam keputusannya, membuat sebarang keputusan bersalah berhubung dengan keempat-empat pertuduhan terhadap plaintif. Plaintif yang berasa terkilan, telah memulakan satu tindakan untuk pengisytiharan bahawa pemecatan beliau adalah salah di sisi undang-undang dan tidak berperlembagaan dan dengan itu adalah batal. Mahkamah Tinggi telah menolak tindakan tersebut dan plaintif telah merayu. Isu di hadapan Mahkamah Rayuan adalah sama ada prosiding yang menyebabkan pemecatan plaintif adalah sejajar dengan kaedah-kaedah keadilan asasi.

Diputuskan:
Oleh Mohd Saari Yusoff HMR

[1] Representasi-representasi plaintif melalui jawapan beliau kepada surat tunjuk sebab adalah memadai untuk menyangkal keempat-empat pertuduhan tersebut dan membebaskan beliau dari tuduhan di dalam lingkungan terma-terma A. 26(4) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1980.

[2] Memandangkan bahawa tidak terdapat keterangan untuk menyangkal kenyataan-kenyataan plaintif yang membebaskannya daripada tuduhan dan bahawa laporan-laporan yang biasa dan kenyataan saksi-saksi telah tidak dibekalkan kepada plaintif, Suruhanjaya sepatutnya mengadakan satu pembicaraan lisan atau siasatan. Kegagalan Suruhanjaya tersebut untuk mengadakan satu pembicaraan lisan telah dengan itu, dalam keadaan-keadaan sesungguhnya kes tersebut, telah melucuthak plaintif dari peluang untuk didengar dengan sewajarnya. Akibatnya, prosiding tatatertib yang dikendalikan oleh Suruhanjaya tersebut adalah tidak konsisten dengan kaedah-kaedah keadilan asasi sepertimana yang termaktub di bawah per. 135(2) Perlembagaan Persekutuan.

[Rayuan dibenarkan; perintah pemecatan diketepikan; plaintif ditempatkan semula.]

Case(s) referred to:
B Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] 28 MLJ 169 ***(foll)***
Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 CLJ 333 ***(dist)***
Hotel Equatorial (M) Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor [1984] 2 CLJ 6; [1984] 1 CLJ (Rep) 155 ***(refd)***
Mak Sing Kwong v. Minister of Home Affairs, Malaysia (No 2) [1975] 2 MLJ 175 ***(refd)***
Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 CLJ 619 ***(refd)***

Legislation referred to:
Federal Constitution, art. 135(2)
Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980, O. 26(4)

For the appellant - Aris Rizal C Fernando (Maniam Raja & Marisa Regina); M/s Aris Rizal Christopher Fernando & Co
For the respondents - Mary TS Lim SFC (Puan Suzana SFC)

[Appeal from High Court, Seremban; Civil Suit No: 22-141-1994]

Reported by Gan Peng Chiang

JUDGMENT

Mohd Saari Yusoff JCA:

Factual Background

At all material times the appellant ("ASP Ang") was Assistant Superintendent of Police. In his evidence, SD1, the secretary of first respondent ("PSC") deposed that upon receiving a report from secretariat IGP cawangan tatatertib, caused summary of facts, report and statement of witnesses to be circulated to members of the first respondent for the purpose of determining whether there was a *prima facie* case against the appellant. Subsequently, a show-cause letter dated 30 June 1993 (p. 76 of AR) was sent to ASP Ang, in which it contained four charges. In response to the letter, ASP Ang made a representation to PSC *vide* his letter dated 23 July 1993 (p. 80 of AR).

On receipt of ASP Ang's letter, PSC convened a meeting to deliberate over the alleged disciplinary offences committed by ASP Ang. At that meeting, by majority decision, the members decided to dismiss ASP Ang from service. The decision was conveyed to ASP Ang *vide* letter dated 30 December 1993 (p. 103 of AR). Significant to note that no committee of inquiry was set up. Further, it is noted that report and statement of witnesses were not supplied to ASP Ang.

With regard to the letter dated 30 December 1993 (p. 103 of AR), it merely states that ASP Ang be dismissed from service. There was no separate finding of guilt in respect of each of the four charges.

In a suit before High Court Seremban, ASP Ang claims *inter alia* for the following:

i) A declaration that the plaintiff's dismissal from the Police Force is unlawful, unconstitutional, void and of no effect and that the plaintiff is still an Assistant Superintendent of Police in the Royal Malaysian Police Force and entitled to all the salaries, emoluments and benefits due as such Assistant Superintendent of Police;

ii) An enquiry to determine the salaries, emoluments and other benefits due to the plaintiff;

The suit was dismissed with cost, hence this appeal.

Issue

Issue for determination is whether the proceeding which resulted in the dismissal of ASP Ang was conducted in accordance with natural justice.

Finding

In his lengthy letter dated 23 July 1993 (p. 80 of AR), ASP Ang denied receiving any bribe. In answer to the first and second charges, in his letter, ASP Ang said that he was in possession of statutory declaration of Sanmugam in which Sanmugam denied receiving the money or giving it to ASP Ang. In both the charges ASP Ang was accused of receiving bribes through Sanmugam. Sanmugam was a police personnel who served under ASP Ang in IPD cawangan mahkamah.

Based on unchallenged evidence of Sanmugam (SP5) in the court below, Sanmugam did not give any money to ASP Ang.

With regard to third and fourth charges, they were inter-related with the earlier charges. In the fourth charge, ASP Ang was accused for failing to report about illegal gambling activities in Seremban. In his letter, he denied having any information about gambling activities in Seremban. On the basis that he was not in charge of criminal investigation, he had no access to such information. At all material times, ASP Ang was attached to IPD cawangan mahkamah as a prosecuting officer.

Under O. 26(4) of General Orders 1980, it states:

> 4) If the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the Appropriate Disciplinary Authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

In applying O. 26(4) aforesaid to the facts and circumstances of this case, we are of the view that, by his letter dated 23 July 1993, ASP Ang had given sufficient exculpatory statement to rebut against all the four charges. On the other hand, with regard to the defence's case, we find no evidence whatsoever to substantiate the four charges.

In judicial review cases as here, the court is concerned with whether procedural fairness had been administered and the court has no jurisdiction to consider the merits of the case (see *Hotel Equotarial (M) Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor* [1984] 2 CLJ 6; [1984] 1 CLJ (Rep) 155. It follows, therefore, that the court is not involved in evaluation of evidence which transpired at the disciplinary proceeding as stated by Abdoolcader J in *Mak Sing Kwong v. Minister of Home Affairs, Malaysia (No. 2)* [1975] 2 MLJ 175 at p. 178:

> Once it is conceded that there is some evidence to support a finding of fact then the court has no jurisdiction to probe into its relative probative force and sufficiency (*Stocker v. Minister of Health* [1938] 1 KB 655, *Jacob v. Attorney-General* [1970] 2 MLJ 329).

However, what troubles this court is that, from the record, there is no evidence whatsoever to rebut or contradict the exculpatory statement of Ang.

The learned trial judge had misdirected himself when he said in his judgment at p. 11:

> Having regard to the charges against the Plaintiff and his complete denial of the charges the Commission did not err in its discretion not to proceed further by way of an oral hearing.

In her submission, in support of her contention that no oral enquiry was necessary, the learned SFC cited the case of *Ghazi bin Mohd Sawi v. Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 CLJ 333. The facts in that case is distinguishable. In that case, the alleged bribe was paid direct to the officer concerned and not through a third party as here.

There is nothing in law which prohibits a disciplinary authority from holding oral hearing or enquiry. The decision whether to hold an enquiry or not would depend on the circumstances of each case. Under the circumstances of this case, the fact that there is no evidence whatsoever to contradict the exculpatory statement of ASP Ang, holding of oral hearing or enquiry would, in our view, be justifiable. It follows, therefore, by such omission, it tantamount to failure on the part of PSC to afford ASP Ang a reasonable opportunity of being heard. In this regard, I am fortified by the observation of Jemuri Serjan CJ Borneo (as he then was) when he said in *Ghazi*'s case *(supra)* at p. 345:

> Similarly, in this case, we have examined the relevant provisions of Chapter D of the 1980 General Orders, and it is beyond dispute that these provisions have been assiduously followed by the respondent, and having regard to all the authorities cited earlier on an oral hearing or inquiry **under the circumstances of this case** was not justified. (emphasis added)

meaning it is justifiable for oral hearing to be held under certain circumstances (see *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 CLJ 619.

Further, the statement of witnesses and reports, although they were circulated to members of PSC, were not supplied to ASP Ang. That being the case, it becomes all the more necessary for oral hearing to be held. In this regard, I refer to the case of *B. Surinder Singh Kanda v. The Government Of The Federation Of Malaya* [1962] 28 MLJ 169. In that case, unlike this case, officer concerned (Insp. Kanda) was supplied with a report of Board of Inquiry. The question arose whether the hearing by adjudicating officer was vitiated by Insp. Kanda not being given any opportunity of correcting or contradicting the report in that case, in the judgment of Lord Denning, at p. 172, his lordship said:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn, L.C. in *Board of Education v. Rice* [1911] AC 179, 182; 27 TLR 378) down to the decision of their Lordships Board in *Ceylon Unniversity v. Fernando* [1960] 1 WLR 223; [1960] 1 All ER 631, PC). It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not enquire whether the evidence or representations did work to his prejudice: Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the Judge without his knowing. Instances which were cited to their Lordships were *Re Gregson, Rex v. Bodmin Justices* ([1947] KB 321; [1947] 1 All ER 109) and *Goold v. Evans* [1951] 2 TLR 1189), to which might be added *Rex v. Architects Registration Tribunal* [1945] 2 All ER 131; 61 TLR 445), and many others.

In the premise and for reasons given above, we hold that the proceeding which resulted in the dismissal of ASP Ang was not conducted in accordance with natural justice as enshrined under art. 135(2) of Federal Constitution. In the result, we allow the appeal with cost here and the court below and we make the following orders:

i) we set aside the order of dismissal against ASP Ang and order that ASP Ang be reinstated in the police force;

ii) with regard to prayer 2 of statement of claim, we remit the case to the court below for assessment by the learned registrar.

My learned brothers Mokhtar bin Haji Sidin JCA and Alauddin bin Dato' Mohd. Sheriff JCA have read this judgment in draft and have expressed their agreement with the same.